

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION

DAVID W. McDANIEL,

Plaintiff,

v.

Case No. 3:10-cv-01417

STATE OF WEST VIRGINIA,

Defendant.

PROPOSED FINDINGS AND RECOMMENDATIONS

Pending before the Court is petitioner's Petition for Writ of Mandamus (Docket No. 1). This matter is assigned to the Honorable Robert C. Chambers, United States District Judge and, by Standing Order, has been referred to the undersigned United States Magistrate Judge for the submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B).

I. Relevant Facts

On January 26, 2006, Petitioner pled guilty to two counts of first Degree Sexual Abuse for the unlawful touching of his eldest stepdaughter. He was sentenced to prison and began serving his sentence on February 5, 2006.¹ (Docket No. 1 at 1-2). On May 28, 2008, the Circuit Court of Putnam County, West Virginia, Judge Eaglowski, held a hearing on an action filed to terminate petitioner's parental rights to his two biological children. Judge Eaglowski

¹According to the Docket No. 11, petitioner has been released from prison and now resides in Charleston, West Virginia.

entered an Order terminating petitioner's rights. (*Id.* at 2). Petitioner appealed that Order to the Supreme Court of Appeals of West Virginia. The Court refused to hear the appeal by a vote of 5-0.²

Petitioner filed the instant action on December 28, 2010, requesting the United States District Court to issue a writ of mandamus ordering "the West Virginia Supreme Court of Appeals to set a date for the hearing of your Petitioner's appeal; and, to reinstate attorney Joseph Reeder as Counsel of Record in said matter; and, for any further relief deemed appropriate by the Honorable Court." (*Id.* at 3). Having conducted a preliminary review of the Petition, the undersigned finds that this Court lacks subject matter jurisdiction to issue the requested writ of mandamus.³ Accordingly, the undersigned proposes that the United States District Judge dismiss the action with prejudice.

II. Analysis

A writ of mandamus is an extraordinary writ that exists for the sole purpose of aiding courts in the exercise of their appellate jurisdiction and "in such cases as are already pending and wherein jurisdiction has been obtained on other grounds and by other process." *Gurley v. Superior Court of Mecklenburg*, 411 F.2d 586, 587 (4th Cir. 1969). Title 28 U.S.C. § 1361 provides that United States District Courts have original jurisdiction "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency

²See report of May 5, 2010 Writ Conference, Case No. 100353. http://www.state.wv.us/wvsca/calendar/may5_10.htm

³At first blush, the Petition appeared to request review of petitioner's conviction for sexual abuse; accordingly, it was docketed as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. However, upon closer examination, the Petition actually seeks a writ of mandamus.

thereof to perform a duty owed to the plaintiff.” As stated, a federal court may only issue a writ of mandamus against an employee or official of the United States and may only command that employee or official “to perform a mandatory or ministerial duty, rather than one that is purely discretionary.” *Ocean Breeze Festival Park v. Reich*, 853 F. Supp. 906, 915 (E.D. Va. 1994), *affirmed by Virginia Beach Policeman’s Benevolent Association v. Reich*, 96 F.3d 1440 (4th Cir. 1996). As such, this Court has no general power to compel action by the Supreme Court of Appeals of West Virginia and, certainly, has no authority to order the Supreme Court of Appeals to hear a discretionary appeal. Simply stated, “[t]his court has no original jurisdiction in the matter now presented and in no sense sits as an appellate tribunal for any state court.” *Gurley v. Superior Court of Mecklenburg*, *supra* at 587. Since this Court lacks jurisdiction to issue the writ, the Petition must be dismissed.⁴

III. Proposal and Recommendations

The undersigned respectfully **PROPOSES** that the United States District Judge confirm and accept the foregoing findings and **RECOMMENDS** that Petitioner’s Petition for Writ of Mandamus (Docket No. 1) be **DISMISSED** with prejudice.

Petitioner is notified that this “Proposed Findings and Recommendations” is hereby **FILED**, and a copy will be submitted to the Honorable Robert C. Chambers, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, petitioner shall have fourteen days (filing of objections)

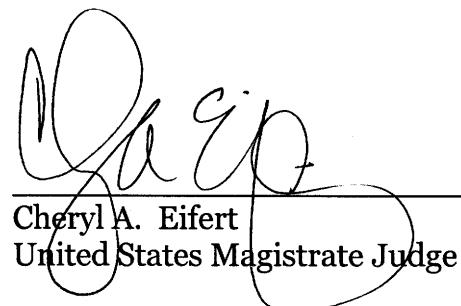
⁴ Petitioner has also failed to pay the filing fee as ordered by this Court. For that reason, the undersigned also recommends that the Petition be dismissed.

and three days (mailing) from the date of filing this "Proposed Findings and Recommendations" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendations" to which objection is made and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to the opposing parties, Judge Chambers and Magistrate Judge Eifert.

The Clerk is instructed to provide a copy of this "Proposed Findings and Recommendations" to the petitioner, the respondent, and any counsel of record.

FILED: March 22, 2011.



Cheryl A. Eifert
United States Magistrate Judge